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Supreme Court, U.S.
FILED
OCT 28 2009
OFFICE OF THE CLERK

No. 09-369

In The
Supreme Court of the United States

DAWN MAGGARD AND DARRELL MAGGARD,
Petitioners,

v.

FORD MOTOR COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Sixth Circuit reversed a jury verdict because the trial court abused its discretion by excluding an excited utterance providing the only evidence contradicting the petitioners' version of how an accident happened.

The question presented is whether the Sixth Circuit improperly allocated the burden of persuasion in deciding whether this error was prejudicial.

RULE 29.6 STATEMENT

Ford Motor Company has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Respondent, Ford Motor Company ("Ford"), respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the decision of the Court of Appeals for the Sixth Circuit.

INTRODUCTION

In this case, the Sixth Circuit reversed and remanded for new trial because the trial court abused its discretion by excluding, on hearsay grounds, an excited utterance that provided "the most contemporaneous account of the accident available," Pet. App. 21 and the only "alternate explanation of the events" contradicting "the version put forward by [petitioners] at trial." Pet. App. 20. Given the importance of this admissible evidence in the total mix of information that the jury should have been able to consider, the Sixth Circuit logically concluded that its exclusion was not harmless. Pet. App. 19-21.

Largely conceding the narrow, case-specific nature of this decision, petitioners' primary request is that the Court vacate the Sixth Circuit's decision and remand for reconsideration based on the statement in *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009) that the appellant bears the "burden of persuasion" on the question of harmless error. Pet. App 2. But *Shinseki* made no new law in that regard. As petitioners concede, the Court merely "applied general case law governing application of the harmless error rule in civil appeals." Pet. 3. Indeed, *Shinseki* cited decisions from this Court going back to 1943 holding that the party claiming error bears the burden of showing prejudice. 129 S. Ct. at 1705. Because this principle long has

been established in the decisions of this Court, there is no reasonable possibility, much less probability, that the Sixth Circuit would reach a different decision on remand simply because it was reiterated in *Shinseki*.

Moreover, there is no hint in this case that the Sixth Circuit did not place the burden of persuasion on Ford or that allocating the burden of persuasion determined the outcome of the harmless error question. Petitioners rely on the Sixth Circuit's statement of the standard for determining that error was harmless as evidence that it placed the burden of persuasion on them. Pet. 5. But that standard is consistent with requiring the appellant to show prejudice, and it has been applied in that manner by the Sixth Circuit. Nothing the Sixth Circuit said suggests that it did not require Ford to persuade it that the error was harmful.

As *Shinseki* itself shows, moreover, allocation of the burden of persuasion will seldom determine the outcome of the harmless error inquiry. That burden requires only that the appellant "explain why the erroneous ruling caused harm" and "[o]ften the circumstances of the case will make clear to the appellate judge that the ruling, if erroneous, was harmful and nothing further need be said." 129 S. Ct. at 1706. The burden of persuasion creates no presumption, one way or the other, as to whether an error was harmless in a particular case. *Shinseki*, 129 S. Ct. at 1705 (harmless error must be determined by "case-specific application of judgment, based on examination of the record," not "mandatory presumptions and rigid rules.") Because the erroneously excluded evidence in this case was unique, not cumulative, and went to the most critical issue in

the case – how the accident happened – prejudice was readily apparent.

Because the decision below involves a fact-bound application of long-settled precedent, conflicts with no decision of any other court, and properly held that the trial court's erroneous exclusion of the only evidence contradicting the petitioners' version of material events was not harmless, the Court should deny the petition.

COUNTERSTATEMENT

Petitioner Dawn Maggard was injured when a Ford Windstar van rolled backwards trapping her leg and pulling her down her driveway. Pet. App. 3. Petitioners contended that the accident occurred because the transmission was in "illusory park" and spontaneously shifted into reverse after Dawn exited the vehicle with the engine running, and walked toward the back door of her house. Pet. App. 4. Critical to petitioners' claim against Ford was her testimony that the vehicle "remained stationary" when she left the vehicle – her evidence of so-called illusory park – and started rolling while Dawn was away from the vehicle – her evidence of a spontaneous shift to reverse. Pet. App. 3.

The only evidence contradicting this version of events was a statement made to the investigating police officer by Dawn Maggard's 10-year-old daughter, Holly, shortly after the accident. At that time, Holly said that the van started rolling when her mother "was halfway in the van," because she "slipped" and "grabbed the gearshift." Pet. App. 5. By the time of her deposition and trial, however, Holly had conformed

her version of the accident to that of her mother. Pet. App. 4.

Petitioners moved to exclude Holly's contemporaneous statement on the grounds that it was hearsay and, if admitted, would have a devastating effect on their case. Petitioners conceded that admission of Holly's statement "could control the outcome of this case," and if the jury believed Holly's contemporaneous statement "then Ford will win this case." R 107 and 108, Plaintiffs' Reply in Support of Fourth Motion in Limine at 11, and Motion for Leave to File Reply. The trial court granted the motion and precluded Ford from introducing any evidence of Holly's statement to the police officer, or even using it to impeach Holly when she testified at trial. Pet. App. 7, 21, fn. 11.

The Sixth Circuit, concluding that Holly's statement was an excited utterance that should have been admitted – a ruling petitioners do not challenge – held that given its importance in the context of this case, its exclusion was not harmless. Pet. App. 19-21. Petitioners filed a motion for rehearing and rehearing *en banc* arguing, among other things, that the court improperly placed the burden on them to establish that the error was harmless. Petition for Rehearing En Banc or for Panel Rehearing at 6. The Sixth Circuit denied the motion for rehearing because "the issues raised in the petition were fully considered upon the original submission and decision of the case." Pet. App. 32.

REASONS FOR DENYING THE WRIT

I. THERE IS NO REASON TO BELIEVE THAT THE SIXTH CIRCUIT WOULD DECIDE THE HARMLESS ERROR QUESTION DIFFERENTLY IN LIGHT OF *SHINSEKI*

Petitioners seek to invoke this Court's GVR power by arguing that, because *Shinseki* was decided two weeks after the decision in this case, the Sixth Circuit did not have the opportunity to consider *Shinseki's* statement that the appellant has the burden of persuading the court that an error was prejudicial. Pet. 2, 5. But *Shinseki* did not establish any new law on the burden of persuasion. The issue in *Shinseki* was whether a presumption of harmful error adopted by the Federal Circuit in veterans proceedings was consistent with the harmless error rule codified in the Veterans Court statute. *Shinseki*, 129 S. Ct. at 1704. Determining that the statute required "the same kind of 'harmless error' rule that courts ordinarily apply in civil cases," the Court compared the presumption to the ordinary harmless error rule, and found it inconsistent. *Id.*

Shinseki, therefore, broke no new ground regarding the proper application of the harmless error rule in civil cases. It merely applied well-established principles, including the principle that the party claiming error bears the burden of showing prejudice. *Shinseki*, 129. S. Ct. at 1705-06, citing, *inter alia*, *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943). Thus, while the Sixth Circuit did not have *Shinseki's* statement of this principle at the time of its original decision, it had the benefit of many other cases from

this Court, and other federal courts, expressing the same principle. Because *Shinseki* did not change anything regarding the burden of persuasion, there is no reason to believe the Sixth Circuit would change its decision in light of *Shinseki*.

Petitioners, in fact, do not point to anything in the Sixth Circuit decision indicating that it did not place the burden on Ford to demonstrate that the exclusion of Holly's statement was prejudicial. Petitioners argue that the Sixth Circuit's articulation of the standard for determining harmless error – whether the court has "fair assurance" that the verdict "was not substantially swayed by the error" – implicitly put the burden of persuasion on them. But, the Sixth Circuit, applying the same standard, has recognized that the burden of persuasion is on the appellant. *See Beck v. Haik*, 377 F.3d 624, 635 (6th Cir. 2004) (noting appellant must "deprive the appellate court of fair assurance that the error was not outcome determinative"), *overruled on other grounds, Adkins v. Wolever*, 554 F.3d 650 (6th Cir. 2009). In fact, this is the standard articulated in *Kotteakas v. United States*, 328 U.S. 750, 765 (1946), which this Court relied on in *Shinseki* to describe how the harmless error rule should be applied. 129 S. Ct. at 1705. This articulation of the standard does not suggest that the Sixth Circuit failed to place the burden of persuasion on Ford.

In deciding the harmless error question, the Sixth Circuit focused on arguments advanced by Ford in its appellate briefs as to why the erroneous exclusion of Holly's statement was prejudicial, not harmless: (1) that the evidence was not cumulative, but provided the only description of the accident contradicting petitioners' version; (2) that excluding the evidence

limited the jury to a single version of the accident that supported petitioners' liability theory; and (3) that it was the only contemporaneous description of the accident made before the opportunity to fabricate. Pet. App. 19-21. The court also considered, and rejected as unpersuasive, certain arguments advanced by petitioners and the dissenting judge as to why the jury might have disbelieved Holly's statement, even if it had been admitted. Pet. App. 20, fn. 10.

In short, the Sixth Circuit found Ford's arguments as to why this evidentiary error was prejudicial to be more persuasive than the counter-arguments advanced by petitioners. This is all that the burden of persuasion requires, as this Court explained in *Shinseki*:

> To say that the claimant has the 'burden' of showing that an error was harmful is not to impose a complex system of 'burden shifting' rules or a particularly onerous requirement. In ordinary civil appeals, for example, the appellant will point to rulings by the trial judge that the appellant claims are erroneous, say, a ruling excluding favorable evidence. Often the circumstances of the case will make clear to the appellate judge that the ruling, if erroneous, was harmful and nothing further need be said. But, if not, then the party seeking reversal normally must explain why the erroneous ruling caused harm.

Shinseki, 129 S. Ct. at 1706.

Nothing in *Shinseki* remotely suggests that the Sixth Circuit improperly allocated the burden of

persuasion on the issue of harmless error, or that such an allocation made a difference in the ultimate conclusion. Because there is no reasonable possibility, much less probability, that the Sixth Circuit would reach a different conclusion in light of *Shinseki*, petitioners' request for a GVR order should be denied.

II. THIS CASE RAISES NO ISSUE REGARDING HARMLESS ERROR MERITING REVIEW BY THIS COURT

In their alternative request that this Court grant *certiorari*, petitioners posit that there is a split of authority among the federal circuits as to which party has the burden of persuasion on the issue of harmless error. To create this purported conflict, however, petitioners once again rely on semantic differences in how courts have articulated the standard for finding error harmless or prejudicial, rather than statements about which party has the burden of persuasion. Pet. 9, fn. 2 and 3. As shown above, no matter how the standard is articulated, the appellate court can look to the appellant to persuade it that the standard for finding prejudice has been satisfied. Petitioners demonstrate no conflict on allocation of the burden of persuasion or that the issue is raised by this case. Moreover, given the rather innocuous role of the burden of persuasion in appellate decision-making as described in *Shinseki*, the issue is not sufficiently important to merit review by this Court.

It appears that what petitioners seek is not a proper allocation of the burden of persuasion, but rather a presumption in favor of finding error harmless that would place all risk of uncertainty about the effect of trial error on the appellant. *Id.* Given

that the effect of trial error on a jury can never be known with certainty, this effectively would render almost all errors in jury trials harmless. This Court rejected the use of presumptions and rigid rules in *Shinseki*, in favor of the kind of case-specific exercise of judgment that occurred here:

> We have previously warned against courts' determining whether an error is harmless through the use of mandatory presumptions and rigid rules rather than case-specific application of judgment, based on examination of the record.

Shinseki, 129 S. Ct. at 1704-05. Having just reiterated the case-specific nature of the harmless error question, and the minimal role of the burden of persuasion to that inquiry, there could be no reason for this Court to grant *certiorari* in order to impose a rigid presumption or "burden shifting" procedure on harmless error analysis. Petitioners have raised no issue meriting review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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